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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 470

WILLIAM CLARK,

Petitioner,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

LLOYD PAUL STRYKER.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 470

WILLIAM CLARK,

Petitioner,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The petitioner above named prays that a writ of certiorari be issued to review the judgment of the Court of Claims of the United States, entered in this cause on July 7, 1947 against the petitioner (R. 32).

Opinion Below

The opinion of the Court of Claims (R. 17) is reported in 72 Fed. Supp. at page 594.

Jurisdiction

The judgment of the Court of Claims was entered on July 7, 1947 (R. 32). The petitioner's time to file this petition for a writ of certiorari was extended to December 6,

1947 by order of Chief Justice Fred M. Vinson dated September 18, 1947 (R. 40).

Questions Presented

As a result of his entrance into the army shortly after the outbreak of World War II, petitioner, a United States judge, has been constrained to sue to establish his right to the salary of his judicial office.

Petitioner has been first a United States District Judge, appointed in 1925 (R. 7), and then a judge of the Third Circuit Court of Appeals, promoted in 1938 (R. 7).

On March 24, 1942, because he felt "too closely concerned to be able to say" whether he should resign or take a leave of absence from the bench (R. 10), petitioner offered his resignation to the President who had promoted him to the Circuit Court of Appeals and the Commander-in-Chief of the armed forces who had commissioned him a lieutenant-colonel. President Roosevelt told the petitioner to "take a leave of absence instead of resigning" (R. 11). Thereafter, and on the advice of his Attorney-General (R. 14), the President on March 26, 1942, attempted to revoke his previous rejection of petitioner's offer to resign on the ground that petitioner's "voluntary entry into the military service will not permit the retention of your commission as United States Circuit Judge" (R. 11).

Upon these facts the following important questions affecting the administration of justice are presented:

1. Does a public office become vacant upon the transmission of the incumbent's offer to resign, or must that offer to resign be accepted by the appointing authority?

2. Does a public office become vacant upon the acceptance by the incumbent of a temporary office in the army of the United States?

3. Does the Selective Training and Service Act of 1940, as amended, prevent the vacation of a public office by the incumbent's temporarily entering the armed forces during the period covered by the statute?

4. Is there "a lack of substantial evidence to sustain" the finding of fact of the court below (28 U. S. C., § 288, as amended May 22, 1939, c. 140, 53 Stat. 752) that the President at the interview of March 24, 1942, neither finally accepted nor rejected petitioner's resignation, nor finally decided whether petitioner should resign or go on leave of absence? Similarly, is there "a lack of substantial evidence to sustain" the conclusion that petitioner's offer of resignation was still open for acceptance (R. 10)?

The Constitution and Statutes Involved

The Constitution of the United States, Article III, Section 1, provides:

> "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

The Service Extension Act of 1941 (c. 362, § 7; 55 Stat. 627; 50 U. S. C., App. § 357, as amended Dec. 8, 1944; c. 548, § 3, 58 Stat. 799), provides as follows (§ 7):

> "Any person who, subsequent to May 1, 1940, and prior to the termination of the authority conferred by section 2 of this joint resolution, shall have entered upon active military or naval service in the land or naval forces of the United States shall be entitled to all the reemployment benefits of section 8 of the Selec-

tive Training and Service Act of 1940, as amended, to the same extent as in the case of persons inducted under said Act: *Provided,* That the provisions of section 8(b)(A) of said Act shall be applicable to any such person without regard to whether the position which he held shall have been covered into the classified civil service during the period of his military or naval service."

The Selective Training and Service Act of 1940 (Sept. 16, 1940, c. 720, § 8; 54 Stat. 890; 50 U. S. C., App. § 308, as amended July 28, 1942; c. 529, § 2, 56 Stat. 724), provides (*inter alia*) as follows (§ 8):

"(a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 3(b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. • • •

(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year——

(A) If such position was in the employ of the United States Government, its Territories or possessions, or the District of Columbia, such person shall be restored to such position or to a position of like seniority, status, and pay;

(B) If such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so

changed as to make it impossible or unreasonable to do so;[1]

(C) If such position was in the employ of any State or political subdivision thereof, it is hereby declared to be the sense of the Congress that such person should be restored to such position or to a position of like seniority, status, and pay.

* * * * * * *

'(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of active military service, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was ordered into such service, and shall not be discharged from such position without cause within one year after such restoration.' "

Statement

This action was brought by petitioner to recover the salary to which he is entitled as a judge of the United States Circuit Court of Appeals for the Third Circuit, from August 15, 1945, to the date of the rendition of the judgment of the court below (R. 17).

Soon after Pearl Harbor, the petitioner volunteered for, and was given a temporary commission in, the armed forces (R. 8). On March 24, 1942, the date on which he took his oath as an officer, he sought and obtained an interview with the President (R. 10). He addressed two letters to the President, dated March 24, 1942 (R. 9-10), both of which are in the files of the Executive Office (R. 10). Both

[1] Subdivision (A), applicable to the Federal Government, admits of no such exception in case of changed circumstances.

letters offered his resignation as a judge of the Third Circuit Court of Appeals, the longer one ending with this paragraph, R. 10):

> "It would be hypocritical for me to pretend that I should not like to have you accede to the request of my colleagues that the Congressional precedent be followed and leave of absence be granted. I have been a judge now for eighteen years, most of my adult life. I love the work and to give it up even for a short time is a great sacrifice. Because of that, however, I feel I am too closely concerned to be able to say what should be done. For this reason, I feel I must leave the decision to you."

In response to the Pres[illegible]inquiry as to the condition of business in the Third Ci[illegible]he petitioner stated that five judges were unnecessary [illegible]nd that he understood that Judge Biggs was going to write to the President to that effect (R. 10).[2] The President replied: " 'If that is so, I will refuse your resignation' " (R. 26). At the conclusion of the interview, Colonel Early, the President's press secretary, was summoned and was requested to advise the press of what had happened. He did so (R. 11) and what he said was stenographically transcribed. The transcription reads:

> " ' • • • the President asked Colonel William Clark to go on a leave of absence, instead of resigning from the Bench' " (R. 26).

The petitioner, on the day following his interview with the President, wrote to the United States marshal at Trenton, N. J., as follows:

> "As you will have observed, the President refused to accept my resignation and suggested that I take a

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[2] About a week earlier, the senior judge of the Circuit Court of Appeals for the Third Circuit, Honorable John Biggs, Jr., had written the President that business in the Third Circuit had decreased (R. 8).

leave of absence. I am, nevertheless, off your payroll from March 24th, 1942, as are my secretary and my law clerk.

I say that because I shall, of course, accept only the pay of my military rank"[3] (R. 37).

On March 26, 1942, the President wrote the petitioner, in part, as follows:

"My dear Bill:

Since talking to you the other day, I have been advised that under the law your voluntary entry into the military service will not permit the retention of your commission as United States Circuit Judge.

Under the circumstances I must regretfully accept your resignation from the judicial post" (R. 11).

On April 2, 1942, the petitioner replied, stating *inter alia:*

"Our friend Frances [sic], seems to me to have unnecessarily complicated the matter of my resignation. As I said to you, I was unwilling to follow the selfish precedent of our Congressional friends and therefore feel I should submit my resignation as a judge. You very generously rejected it and I think I am safe in saying that action on your part met with universal approval.

I try to be careful about the law, particularly when dealing with my President and Commander-in-Chief. I was quite familiar with the statute on which the Attorney General has advised you. It was intended to prevent the receipt of two salaries. * * *

Due to your kindness I am going to a far distant post and imagine I will be there for such length of time that I should have to insist on resigning in any event. It is my suggestion, however, that your recent letter might well be withdrawn pending a clarification of the legal

[3] Curiously enough, although the Court of Claims sought to determine the petitioner's state of mind concerning whether his resignation had been rejected or not, this letter is nowhere referred to in the opinion below.

> situation. As I say, I think I shall have to resign in any event but I should be very reluctant to be forced out, so to speak, on the doubtful interpretation of a statute" (R. 12).

On April 7, 1942, the President wired the petitioner, stating that he thought the wisest thing to do would be to let his resignation stand (R. 13).[4] The petitioner had departed the United States for Australia under military orders on April 6, 1942 (R. 13). On September 28, 1942, while petitioner was in North Africa, his counsel, Mr. Ralph E. Lum, wrote the then Attorney-General, in part, as follows:

> "I know that he (petitioner) went off under the distinct impression that his resignation had been refused by the President and he was certainly justified in that view from letters which are now in my file" (R. 13).

On April 14, 1943, petitioner "wrote a letter to Judge Biggs in which he stated that he had offered his resignation as a Judge to the President and that the President had personally refused to accept it" (R. 37).

Specification of Errors to Be Urged

The Court of Claims erred:

1. In finding that at a conference between the President and the petitioner, held on March 24, 1942, at the White House, the President "neither finally accepted nor rejected plaintiff's resignation, nor finally decided whether plaintiff should resign or go on leave of absence, * * *" (R. 10).

2. In failing to find that the President at this interview unequivocally rejected petitioner's resignation with petitioner's acquiescence and consent.

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[4] This telegram did not reach the petitioner until approximately six months later (R. 13), at a time when the petitioner was "about as far from us as he could get without coming nearer" (R. 14).

3. In holding that the rejection of the petitioner's resignation by the President was of no force or effect.

4. In failing to hold that the President's subsequent attempt to accept the resignation, which he had previously rejected with the acquiescence and consent of the petitioner, was a nullity.

5. In holding that the President's subsequent attempt to accept a resignation, which he had previously rejected with the acquiescence and consent of the petitioner, resulted in a vacation of petitioner's office.

6. In holding that it was incumbent upon the petitioner to withdraw his resignation after the President had rejected it with the acquiescence and consent of the petitioner.

7. In failing to find that the petitioner's resignation had been withdrawn as a result of the rejection thereof by the President with the acquiescence and consent of the petitioner.

8. In holding that the petitioner's resignation was still open for acceptance by the President after the conference held at the White House on March 24, 1942.

9. In holding that a judge of the United States Circuit Court of Appeals is not entitled to the benefits of the Selective Training and Service Act of 1940 and the Service Extension Act of 1941.

10. In failing to hold, in accordance with the provisions of the Selective Training and Service Act of 1940 and the Service Extension Act of 1941, that a judge of the United States Circuit Court of Appeals who volunteers for service in the armed forces, is deemed to be on leave of absence from his office.

11. In failing to apply to a federal judge the principle that one who resigns from an office or position in the employ of the United States Government in order to serve in the

armed forces, is entitled to the protection of the Selective Training and Service Act of 1940 and the Service Extension Act of 1941, although the court recognized that the principle is applicable to others.

12. In holding that the petitioner was not entitled to recover his salary from August 15, 1945, to the date of the rendition of judgment.

Reasons for Granting the Writ

At the outset, we question the theory of the court below, which underlies its entire opinion, that the law of resignation, concededly applicable to public officers generally, is not applicable to those public officers who happen to belong to the judicial branch of our tri-partite republican system. No reported case makes any such distinction, and the text writers repudiate it (Throop, "Public Officers", sec. 409; 19 Am. & Eng. 562r). In fact, the cases considering either the law of resignation (*Steel* v. *Com.* [1852] 18 Pa. 451; *State* v. *Jefferis* [1919] 26 Wyo. 115) or the law of vacation by incompatibility of military office holding (*People* v. *Sischo* [1943] 23 Cal. (2d) 478; *State* v. *Grayston*, 163 S. W. (2d) 235) put judges and other public officers in the same category (Id.). That must be so. Judges are servants of the public, and that public requires that the same rules of law apply to them as to all its servants. This is a case of first impression as far the restoration of judges under the Selective Training and Service Act of 1940 is concerned. Other public officers who served in the armed forces and returned, have been accorded their positions without question.[5]

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[5] Colonel Fell, the distinguished attorney who represented the Government below is one of these.

1. *Important and Heretofore Undecided Question Concerning the Resignation of a Federal Judge.*

There is no reported case, as far as we can discover, covering the question of the resignation of a federal judge.

The Court of Claims held here that the President had no function whatever to serve in the case of a resignation by a federal judge; that he had no power to "accept or reject it," and was entitled to notice of the resignation only so that he might be aware of the fact that a vacancy existed in the office in order that he might exercise his constitutional power of appointing another to the vacancy (R. 21). The court further held that the judge's continuance in office was subject "wholly and alone to the untrammelled will of the judge" (R. 21).

The legal problem involved in the question of resignation goes to the fundamentals of the relation between a citizen and his state. It is a problem, therefore, we think, worthy of resolvement by this honorable Court. The problem is, in the ultimate analysis, what does one owe to the land one lives in and whose protection and advantages one enjoys? The country from which we derive our legal system had no hesitation in its answer. (Mechem, "Public Officers" § 414). At common law a citizen called to public office could be penalized for refusing to accept it (*Rex* v. *Patteson* [1832], 4 Barn. & Ad. 9).

In this country the unwritten or non-statutory law has not gone quite so far, probably for the practical reason, as the cases put it, that seekers after public office are more numerous than the offices they seek (*State* v. *Clayton* [1882] 27 Kan. 442; *Hoke* v. *Henderson* [1833] 15 North Carolina 1). It is conceded, however, that the state can, if it feels it essential to its effective functioning, compel the citizen's service. It has done so in time of war. It does so every day with respect to jury duty. More recently states have re-

quired the acceptance of a municipal office (*Stevens* v. *Haussermann* [1934] 113 N. J. L. 162). We assume, however, that the common law rule [6] as to the mandatory acceptance of public office has not, in the absence of statute, prevailed in the United States. Does it follow, then, that an office once accepted can be vacated at the will of the person who sought it; in other words, by a mere offer to resign? The reply seems to be quite plainly in the negative; on principle, because of what we believe to be a sound conception of public office. We can put that conception no better than it has been put by Edmund Burke:

> "In their nomination to office they will not appoint to the exercise of authority as to a pitiful job, but as to a holy function." (3 Reflections on the French Revolution 356.)

In simple language, if you agree to work for the State, the State is entitled to see that you continue to carry on that work until its convenience, and not yours, is suited. The contrary, and as we shall see, very much minority view is based, we think, on an entirely false premise, namely, that the individual officeholder must not have his liberty of action limited by any loyalty to the State to whose payroll he has been only too pleased to cling. Liberty of action is obviously a relative term both in life and in the law and has many inherent limitations. One such would certainly seem to affect any person who voluntarily agrees to serve the State.

The confusion which underlies the "untrammelled will" [7] theory can, we think, be properly attributed to a failure to

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[6] The civil law is to the same effect (Zanobini, "Administrative Law" Sec. 5, sub. 7; Maline, "Manuel Elementaire de Droit Administratif" Ch. 2, par. 2).

[7] Elsewhere referred to as the "Transmission" theory (See 16 L.R.A. [N.S.] at pp. 1058-9).

distinguish between an act and the consequences of an act. The requirement of an acceptance does not necessarily import any compulsion. It is true that in several cases the courts, by granting mandamus, went that far. (*Nome* v. *Rice* [1908] 3 Alaska 602; *State* v. *Jefferis* [1919] 26 Wyo. 115; *Clark* v. *Board of Education* [1897] 112 Mich. 656.) A more sensible course would be to allow the operation of the normal penalties affecting public officers. If the officer, whose offer to resign were refused, feels aggrieved he has only to abandon his office. If the refusal was justified, that abandonment constitutes the malversation of office spoken of by Mr. Justice Story ("History of the Constitution" p. 346), and the recusant official should suffer the stigma that inevitably goes with removal from office. If, on the other hand, the appointing power has abused its discretion (for instance, supposing the public officer wishing to resign were ill), failure to comply with the refusal to accept the resignation, by abandonment of office would be justified. This seems to us a much more orderly process than permitting resignation by the caprice of the officeholder.

In the case of the petitioner the "untrammelled will" theory reaches the point of absurdity. He expressly stated his desire for a leave of absence (R. 10) and so, of course, his liberty of action in no way was being curtailed.

The overwhelming weight of authority accords with the reasoning we have endeavored to present. Every jurisdiction in this country which has passed upon the question, with one exception, has followed the common law and has declared that the resignation of a public officer to be effective must be accepted either by the appointing authority or by the body established to fill the vacancy. So in the federal courts (*Edwards* v. *United States* [1880] 103 U. S. 471; *Thompson* v. *United States* [1881] 103 U. S. 480) and Alaska (*Nome* v. *Rice* [1908] 3 Alaska 602); and in the state courts: Florida (*State* v. *Lunsford* [1939] — Fla.

— 192 So. 485); Georgia (*Patten* v. *Miller* [1940] — Ga. — 8 S. E. (2d) 757); Kansas (*Hopkins* v. *Board of Education* [1920] 106 Kan. 863); Kentucky (*Tabor* v. *Webb*, [1929] 227 Ky. 611); (*Sparks* v. *Adkins* [1947] 304 Ky. 212, 200 S. W. (2d) 307); Louisiana (*State* v. *School Bd.* [1933] — La. App. —, 150 So. 446); Michigan (*Clark* v. *Board of Education* [1897] 112 Mich. 656); Montana (*State* v. *Page* [1897] 20 Mont. 238); New Jersey (*Stevens* v. *Haussermann* [1934] 113 N. J. L. 162); North Carolina (*Hoke* v. *Henderson* [1833] 15 N. C. 1); New Hampshire (*Attorney General* v. *Marston*, — N. H. —, 13 L.R.A. 670); Oklahoma (*Rogers* v. *Carleton* [1941] — Okla. — 110 Pac. (2d) 902); *Pennsylvania* (*Com.* v. *Hass* [1911] 2 Pa. D. & C. 530); South Carolina (*State* v. *Stickley* [1908] 80 S. C. 64); South Dakota (*State* v. *Kerkow* [1913] 31 S. D. 491); Tennessee (*State* v. *Bush* [1919] 141 Tenn. 229); Texas (*State* v. *Brinkerhoff*, 66 Tex. 45); Virginia (*Coleman* v. *Sands* [1891] 87 Va. 689); Washington (*State* v. *Superior Ct.* [1907] 46 Wash. 616; Wyoming (*State* v. *Jefferis* [1919] 26 Wyo. 115)—the courts have decided categorically that a public officer's offer to resign is effective only if it has been accepted.

We have only been able to find one jurisdiction where an actual decision *contra* exists, namely, Nevada (Cf. *State* v. *Murphy* [1908] 30 Nev. 409), although there are some dicta elsewhere.

The learned court below has favored us with no discussion of principle and only one citation of authority (R. 21-2, footnote 1, referring to *United States* v. *Wright*, 23 Fed. Cas. 792). That citation is unusual since it is only dictum (the resigning officer had agreed to serve until his successor was appointed) and the case has been, as Throop says ("Public Officers" sec. 412) "practically overruled" by this Court in *Edwards* v. *United States* (1880) 103 U. S. 471.

Furthermore, the Court of Claims seems to have very

little confidence in the "untrammelled will" theory. Its opinion is based on a requirement of withdrawal (that word is used eleven times, although it does not appear in the briefs or in the arguments of either side). It seems quite obvious that if the "untrammelled will" of the resigned public officer completes the resignation, no subsequent withdrawal can affect the resignation. One cannot withdraw something that is completed. (*Pace* v. *People*, 50 Ill. 432; *Lockhart* v. *Hauss*, 43 Ind. 105.)

If there is anything in the Court of Claims' view that there is a distinction between a judge and another public officer, it should work in favor of the acceptance theory of resignation. United States judges hold their offices "during good Behaviour." There is no mention in the Constitution of any method of vacation of office. Some of the colonial and State constitutions in effect before the adoption of the Federal Constitution do use the term. It is elementary that the Constitution must be interpreted in the light of the common law existing at the time of its adoption. As we have seen, the common law insisted upon an acceptance before a resignation became effective.

2. *Important and Heretofore Undecided Questions Concerning the Application of Title 5 U. S. C., § 62.*

The Attorney-General advised the President that petitioner had "automatically" vacated his office by virtue of the provisions of Title 5 U. S. C., § 62 (R. 14). Acting on this advice, the President subsequently wrote to the petitioner as follows:

> "Since talking to you the other day, I have been advised that under the law your voluntary entry into the military service will not permit the retention of your commission as United States Circuit Judge.
>
> "Under the circumstances I must regretfully accept your resignation from the judicial post" (R. 11).

Nevertheless, the court below found it unnecessary to pass upon the question of whether "plaintiff vacated his office of judge by the acceptance of a commission in the Army and the acceptance of the salary attached to his military office" (R. 31).

Thus, the petitioner, removed from office because of the claimed application of title 5 U. S. C., § 62, finds his removal sanctioned by the court below without a determination that the statute applies.

In this way, in violation of the provisions of the United States Constitution, the petitioner has been removed as a judge on the strength of a statute which has no application to him or to any other judge in the Federal system.

A judge whose tenure and salary are protected by the Constitution, and the petitioner holds such office, remains a judge "during good Behaviour" (Constitution, Art. III, Sec. 1).[8] He may not be removed from office except through the constitutional method of impeachment, and he does not vacate his office except through death or by his own volition, namely, by resignation.

> "* * * the exercise of the impeaching power is the only available means, save death or resignation, whereby the tenure of the judges may be terminated."
>
> (Brown, "The Impeachment of the Federal Judiciary," 26 Harv. L. R. 684, 694; see also the opinion of the court below [R. 21-2] citing *O'Donoghue* v. *United States*, 289 U. S. 516).

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[8] It should be noted that the Constitutional Convention of 1787 rejected the New Jersey plan which included a specific ban on members of the judiciary holding other office (1 Farrand, "Records of the Federal Convention of 1787", 244). Only with respect to members of the legislative branch of government does the Constitution provide any restriction upon the holding of other office. Thus, Art. I, Sec. 6, Clause 2, provides in part as follows: "* * * no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."

No act of Congress can accomplish by indirection what the Constitution forbids. Thus, Congress by enacting a statute (5 U. S. C. § 62) prohibiting any person who holds an office, the compensation for which exceeds $2,500, from holding any other office to which compensation is attached, cannot effect a vacation of judicial office even if it were intended that such statute apply to the Federal judiciary.

The inability of Congress to provide methods other than impeachment for vacating judicial office is a principle which has been "almost universally acquiesced in from the adoption of the Constitution * * *." (Notes, "The Exclusiveness of the Impeachment Power Under the Constitution", 51 Harv. L. R. 330, 336.)

Despite the long recognized, insuperable constitutional objections to the removal of a Federal judge by Congressional enactment, the Attorney-General advised the President that petitioner's acceptance of an office in the army "automatically" vacated his judicial office under the terms of Title 5 U. S. C. § 62 (R. 14). Even if this statute were intended to apply to the Federal judiciary, and the petitioner maintains that it was not, it nevertheless does not follow that the provisions thereof are self-executing and that a judge who has a life tenure under the Constitution vacates his office *ipso facto* by assuming another office.

In *Burton* v. *United States,* 202 U. S. 344, a member of the United States Senate was convicted of violating a statute which makes it a misdemeanor for a Senator to receive, or agree to receive, compensation for services rendered before any department of the Government in relation to any proceeding in which the United States is interested. The statute provides that by the conviction the defendant shall be rendered thereafter incapable of holding any office of honor, trust, or profit under the government of the United States. The judgment of conviction declared that the defendant was "rendered forever hereafter incapable of hold-

ing any office of honor, trust, or profit under the government of the United States". Commenting upon the statute and the judgment, this Court observed (at p. 369):

> "By its own force, without the aid of such words in the judgment, the statute makes one convicted under it incapable forever thereafter of holding any office of honor, trust, or profit under the government of the United States. But the final judgment of conviction did not operate, *ipso facto*, to vacate the seat of the convicted Senator, nor compel the Senate to expel him or to regard him as expelled by force alone of the judgment. The seat into which he was originally inducted as a Senator from Kansas could only become vacant by his death, or by expiration of his term of office, or by some direct action on the part of the Senate in the exercise of its constitutional powers."

Since the sole method of vacating judicial office is by impeachment, a Federal judge does not vacate his office by his failure to reside in the proper district, although such failure in the case of a district judge [9] is a high misdemeanor (28 U. S. C., §1), or because he has engaged in the practice of the law, although such conduct is also a high misdemeanor (28 U. S. C. §373), or even by the acceptance of a bribe,—misconduct which subjects the judge to fine and imprisonment and forever disqualifies him "to hold any office of honor, trust, or profit under the United States" (18 U. S. C. § 238).

Here the statute on which the Attorney-General relied contains no penalty at all. It does not characterize the acceptance of a second office a crime or misdemeanor, nor does it purport to render the person who accepts a second office

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[9] While a judge of the Circuit Court of Appeals is required by Section 213 of Title 28 to reside within his circuit, the violation of the section is not declared to be a misdemeanor and entails no stated consequence.

incapable of holding an office of honor, trust, or profit under the United States.

Furthermore, Title 5 U. S. C. §62 was never intended by Congress to apply to a Federal judge. If Congress intended to blanket the judiciary under the provisions of Title 5 U. S. C. §62 and to cover anything but executive officers, it would not have attempted to do so in the casual, offhand manner adopted here. (See the extensive debates in Congress on the constitutionality of providing an alternative to impeachment for the removal of Federal judges (81 Cong. Rec. [1937] 6157-96, particularly pp. 6187-9.)

From the fact that with respect to the *judiciary* the power of removal is entirely lacking except by impeachment, contrasted with the fact that the President may remove, without restrictions, all subordinate *executive* officers (*Myers* v. *United States*, 272 U. S. 52) and that others in the executive branch of government who do not fall within the category of strictly executive officers are removable by the person or agency entrusted with their appointment, subject to such regulations as Congress may make (*Humphrey's Executor* v. *United States*, 295 U. S. 602; *United States* v. *Perkins*, 116 U. S. 483), it is apparent at once why Congress would undertake to regulate through the provisions of Title 5 U. S. C. § 62, officers and employees of the executive branch of government where it would not attempt to interfere with the independence of the judiciary. And, it is also apparent why the statute, since it relates only to executive officers and employees who are subject to an unquestioned power of removal, does not need to be implemented with a statement of the penalty incurred by the offender.

Furthermore, even if Title 5 U. S. C. § 62 were intended, at the date of its enactment, to control a situation similar to that presented here, whatever application it might have had was abrogated by the express provisions of the Selec-

tive Training and Service Act of 1940 (50 U. S. C. App. § 316) which read as follows:

> *"Suspension of conflicting laws; expiration of Act; appropriations*
>
> (a) Except as provided in this Act, all laws and parts of laws in conflict with the provisions of this Act are hereby suspended to the extent of such conflict for the period in which this Act shall be in force."

Thus, whatever may have been the legislative prohibition with respect to the acceptance of two salaries [10] prior to the enactment of the Selective Training and Service Act of 1940 and the Service Extension Act of 1941, it is clear that Congress has superseded all prior enactments with the unequivocal declaration that all conflicting laws are suspended.

While the question of incompatibility was not raised in the opinion of the court below, it was briefed extensively by the Government. The very authorities relied on below by the Government (L. R. A. 1917 A, 216; 13 Geo. Wash. Law Review 453) are to the effect that entrance into the armed forces does not result in the vacation of public office (13 Geo. Wash. Law Review 453, 466).

3. *Important and Heretofore Undecided Question Concerning the Selective Training and Service Act of 1940 and the Service Extension Act of 1941.*

Congress has declared that "Any person"—a phrase sufficiently comprehensive to cover a judge—in the employ of the United States Government who is inducted into the armed forces or who voluntarily enters upon active military service, "shall be restored to such position or to a position of like seniority, status, and pay; * * *" (Service

[10] It must be borne in mind that the petitioner accepted only the salary of his army office (R. 15).

Extension Act of 1941, § 7; Selective Training and Service Act of 1940, § 8(b) (A)).

Section 8(c) of the latter act provides that a person so restored shall be "considered as having been on furlough or leave of absence during his period of active military service * * *."[10a]

These statutes were in full force and effect when, on March 24, 1942, the petitioner tendered his resignation and the President, as the court below found, "suggested to plaintiff that he take a leave of absence instead of resigning * * *" (R. 11).

In *Fishgold* v. *Sullivan Drydock & Repair Corporation*, 328 U. S. 275, this Court, construing § 8(c) of the Selective Training and Service Act, stated (at p. 287):

> "A furlough is not considered a discharge. It is a form of lay-off. So is a leave of absence. And whether either results from unilateral action by the employer or otherwise, consequences are quite different from termination of the employment relationship. * * * An employee on furlough or on leave of absence has a continuing relationship with the employer; he retains a right to be restored to work under specified conditions."

Whether petitioner stands on the constitutional mandate of "permanent tenure" or on his "continuing relationship with the employer" under the Selective Training and Service Act, does not alter the fact that he continues to enjoy permanent tenure. In an article entitled "Statutory Reemployment Rights of World War II Veterans," 14 Fordham Law Review 197, written before the decision of this

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[10a] The determination of the issues in this case would in nowise affect the tenure of office of any other circuit court judge since petitioner's position, under the leave of absence statute, is similar to that of a retired judge under 28 U. S. C. § 375.

Court in the *Fishgold* case (*supra*), the author states (at p. 213):

> "The veteran is considered on furlough or leave of absence from his employment during his military service, a fact which suggests that his tenure of employment has never been terminated; rather his active performance on the job has been suspended until such time as he is qualified to apply, and does so, for reinstatement to active employment. Thus, the term 'reemployment' would not seem technically correct since it connotes rehiring."

The "continuing relationship with the employer" which the serviceman enjoys while in the armed forces, has been recognized in the decisions of the National Labor Relations Board and the War Labor Board (2 Labor Relations [Prentice-Hall] Par. 21,711.14). These decisions uniformly accorded to the serviceman the privilege of casting a vote in all elections, at which he was present, held for the purpose of choosing a bargaining representative with the company. In an article entitled "Status of an Employee in the Service of the Country", 30 Iowa Law Review 255, the author summarizes these cases as follows (at p. 258):

> "In the National Labor Relations Board decision of *Mine Safety Appliance Co.*[11] it is stated: 'The Board is not unmindful of the fact that employees on military leave retain their status as employees and, therefore, have a real interest in the choice of a bargaining representative. • • •'"

In the court below, the defendant suggested that Congress has no power to grant a Federal judge a leave of absence. A correct statement of the proposition would be that Congress is powerless to prevent a Federal judge from taking a leave of absence unless it should decide to impeach and

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[11] (Callery Plant) Case 6-R-859 (April, 1944).

remove him for doing so. (See Fairman, "The Retirement of Federal Judges," 51 Harv. L. R. 397, at pp. 407, 416, 419-20 and 421-2, where the long standing practice of judges of this Court to take leaves of absence in the event of illness or disability is noted.)

While Congress may not cut down the tenure of a Federal judge or diminish his salary during his term of office, it may "lighten judicial duties" (*Booth* v. *United States*, 291 U. S. 339, 351) and by implication it may suspend judicial duties entirely, especially during a war emergency.

In the *Booth* case (*supra*), one of the questions certified to this Court was whether "a Federal judge upon retirement continues in office within the meaning of the constitutional provision which forbids diminution of the compensation of judges during their continuance in office, * * *" (p. 339). The Government argued "that the holding of an office involves the performance of duties, and since no duties are obligatory on one who has retired under the Act, he cannot be said to hold any office" (p. 351). This Court flatly rejected the argument.

By the same token Congress may provide, and has provided, that a judicial officer may serve his country in the armed forces and be considered on leave of absence from his judicial office. The practical effect of such a provision is to prevent his impeachment for the "offense" of serving his country in the armed forces.

The terms of the applicable statute are as broad as can be devised by the use of the English language. The words are "Any person" in the employ of the United States Government. It cannot be claimed that a judge is not a person. The adjective "any" as modifying a noun is equivalent to "every" (both words are of Anglo-Saxon origin and are "aenig" and "aefra"), and so "Any person" means "All persons." That has been the ruling of this Court (*Nigro* v. *United States*, 276 U. S. 332, 347).

The learned court below gave four reasons for limiting that all inclusive word. They are:

(1) Public policy; (2) the express exemption of judges by the Selective Training and Service Act of 1940; (3) the fact that judges are appointed by and with the consent of the Senate; (4) the fact that the statute restoring private employees to office provides a remedy in the United States courts and provides no remedy in the case of a person in the employ of the government.

The judges below seemed to be antagonistic to members of their calling going to their country's assistance in time of war, despite the fact that patriotic members of their own court, and more than a dozen other United States judges, were accepted for their country's service. The court reenforced this attitude by the statement that in "most districts" there is only one judge (R. 30), and indulged in some fantasy about a court in uniform. A mere glance at the Federal Reporter will show that out of seventy-nine districts there are only twenty-four where there is only one district judge. Under the statutes, an assignment can always be made from another district. Courts by law and tradition must not attempt to declare policy. It is their function to speak of the validity of what has been done and not to give their views on what ought to have been done.

The argument based upon the statutory exemption from the draft accorded to United States judges, along with many other public officers, state and national, is in effect that because you do not have to go, therefore, you must not go, and if you do go, you will, if you are lucky enough to come back, be treated as an outlaw. This denies the entire historical basis of our original military policy. From the days of the revolution onward, our soldiers were volunteers. That system was reluctantly abandoned under the pressure of global warfare. It would be a perversion of history to

say that such pressure prevented the recruitment of those who did not have to go, which would be exactly the result achieved if such persons were placed in any pariah class after the war. If a war were being conducted on totalitarian principles, then it might be true to say that each citizen could do only what he was told to do, and if he did anything else, he would have to suffer the consequences. There is no pretense that this country has yet had to face any such dilemma. The Commander-in-Chief himself approved of petitioner's entrance into the army.

It is curious that the Department of Justice should be taking such a position,—a position which it assumed in the court below, because in two cases in which it defended the right of a veteran to restoration it argued directly contra and prevailed. In the cases of *Boston & Maine R. R.* v. *Bentubo* (C. C. A. 1, 1947) 160 F. (2d) 326, and *Boston & Maine R. R.* v. *Hayes* (C. C. A. 1, 1947) 160 F. (2d) 325, the Circuit Court of Appeals, First Circuit, held that the fact that a person had been in a deferred category and had relinquished his deferment to volunteer in the army, did not deprive him of the benefits of the statute.

In exempting judges, along with high-ranking executive and legislative officers from the draft, Congress chose appropriate words to accomplish its purpose. The officers exempted were mentioned in express words (Selective Training and Service Act of 1940, § 5(c)(1)). Providing for reemployment, however, after service in the armed forces as a result of *voluntary induction* or the draft, Congress chose to protect "Any person." The difference in language governing the two situations is significant. Thus, although judges were exempted from the draft, no judge who volunteered his services was discriminated against when it came to the reemployment provisions of the statute. Had Congress intended to exclude judges and others from the protection of the reemployment provisions, it would

have done so in express terms,—terms similar to those employed in carving out exemptions from the draft.

Section 8 of the act applies to persons in superior positions and covers almost every kind of relationship in which one person renders regular and continuing service to another (*Kay* v. *General Cable Corporation* [C. C. A. 3, 1944] 144 F. (2d) 653).

The Court of Claims suggested that since a remedy has been provided only for those in private employment, those in public employment are without recourse. It is plain that the creation of a right (statutory or otherwise) does not depend upon the provision of a correlative remedy (*Bell* v. *Hood* [1946] 327 U. S. 678). A Federal employee who has returned from war already has a remedy in United States courts either by way of declaratory judgment or by recourse to the Court of Claims. Congress provided an additional remedy in the Federal courts to those in private employment in order to give them an opportunity to present their grievances to the courts of the country which they had served.

The Court of Claims advances the notion that the advice and consent clause, common to the Federal and State constitutions, prevents any legislation to preserve the civilian offices of those persons, subject to Senate confirmation, who have served their country in other capacities. This is, we think, a complete begging of the question. If there is a vacation of office, it cannot be filled except in the constitutional manner. If the statute prevents a vacation, however, there is no occasion, constitutional or otherwise, to fill it. The Court of Claims says in effect that it is impossible to provide for a leave of absence or retirement of a Federal judge, because such judge returning after an illness, or a retired judge being called back to sit, would, on the theory of the court below, have to be confirmed by the Senate. There is already legislation similar to that at bar in the

Federal statutes. Postmasters who serve in the armed forces are deemed to be on leave of absence (39 U. S. C., § 39a). Likewise, the statutes of many of the States, in providing for similar military leaves for officers, subject to Senate confirmation, actually include those officers in a statutory description.[12]

4. *Lack of Substantial Evidence to Support Basic Findings of the Court Below.*

There is a lack of substantial evidence to sustain the finding of the court below that the President at the interview of March 24, 1942, neither finally accepted nor rejected petitioner's resignation, nor finally decided whether petitioner should resign or go on leave of absence (R. 10). The evidence was overwhelming and conclusive that the petitioner's offer of resignation was refused, and he was advised by the President to take a leave of absence instead.

The petitioner so testified (R. 33); the contemporaneous memorandum made by Mr. Early of his conversation with the President on March 24th, so states (R. 26); Captain Karig, U. S. N., who attended a press conference held by Mr. Early on that date, testified to the same effect (R. 34-36); the petitioner's letter of March 25, 1942, to the United States Marshal of his district, refers to the President's refusal to accept the resignation and his suggestion that petitioner take a leave of absence (R. 37); the petitioner's letter to the President nine days later refers to the proffered resignation and states: "You very generously rejected it" (R. 12); the President, when he answered this letter, failed to dispute the petitioner's statement concerning the rejection of the resignation (R. 13); the letter written by Mr. Ralph E. Lum on behalf of the petitioner to the Attorney-General on September 28, 1942, also refers to the Presi-

[12] Cf., N. Y. State War Emergency Act, Art. X-A, § 105-a.

dent's refusal of petitioner's resignation (R. 13); and finally, petitioner himself on April 14, 1943, wrote to Judge Biggs stating that he had offered his resignation as a judge to the President, and that the President had personally refused to accept it (R. 37).

The court below predicated its finding that the President intended to keep the matter open for future action on the fact that the short letter of resignation (R. 9) was referred by the President to the Attorney-General some time after the conference of March 24, 1942 (R. 24),[13] and that the President subsequently accepted the resignation which he would not have done, said the court below, if he had finally settled the matter on March 24, 1942 (R. 24). This argument, however, completely overlooks the fact that the President's attempt to accept petitioner's resignation, which he had previously rejected, was predicated on the erroneous advice he had received from his Attorney-General that petitioner's office had become vacant under Title 5, U. S. C., § 62 (R. 14). The office had been vacated "automatically", the President was informed by his Attorney-General (id.). Resignation, therefore, had nothing to do with the President's action. This is apparent from the advice that the Attorney-General gave him (R. 14) and from the President's letter which he sent in pursuance of that advice (R. 11).

Conclusion

We are convinced that the court below has here passed on questions vital to the tenure of office of all Federal judges and other public officers in a manner contrary to well-established rules of law and to the detriment of an effective public service. We are convinced that the learned court below

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[13] It is a fair inference that after the conference of March 24, 1942, and the publicity in the press with respect thereto (R. 36), the Attorney-General requested that the matter be referred to him.

has given an interpretation to the Selective Training and Service Act which is contrary to sound principles of statutory interpretation and which may very well prove to be injurious to any future defense of the country. We are convinced that the petitioner, a judge of a court next in rank to this honorable court, is entitled to learn his legal position from the mouths of his judicial superiors.

Respectfully submitted,
LLOYD PAUL STRYKER.

December, 1947.